No. 221
Brief of Gordon for Appellee
Filed Mar. 23, 1901

Supreme Court
FILED
MAR 30 1901

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 221.

ROLLINSON COLBURN ET AL., APPELLANTS,

vs.

ROBERT E. GRANT, EXECUTOR, ET AL., APPELLEES.

Appeal from the Court of Appeals for the District of Columbia.

BRIEF FOR APPELLEE.

J. HOLDSWORTH GORDON,
Solicitor for Appellee.

Law Reporter Print.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 221.

ROLLINSON COLBURN ET AL., APPELLANTS,

vs.

ROBERT E. GRANT, EXECUTOR, ET AL., APPELLEES.

Appeal from the Court of Appeals for the District of Columbia.

BRIEF FOR APPELLEE.

STATEMENT OF CASE.

This case comes to this court on an appeal from a decree of the Court of Appeals for the District of Columbia, affirming a decree of the Supreme Court of said District, dismissing a bill in equity, filed by the appellants herein for an accounting. The case, as shown by the bill, answer and stipulation as to facts, is as follows:

On May 27, 1872, Augustus G. P. Colburn died in the city of Newark, New Jersey, leaving his last will and testament, dated May 25, 1872, whereby he devised to his son, George Fitz James Colburn, for and during his natural life, a certain dwelling-house in said city of Newark, with power to the trustees named in the will, namely, said George Fitz James Colburn and John W. Taylor, to sell the same and the proceeds to invest, and the interest to pay to the said George Fitz James Colburn during his lifetime.

Shortly after the death of the testator the real estate in Newark was sold by the trustees, the net proceeds therefrom, amounting to twenty-seven thousand ($27,000) dollars, was paid part in cash and the remainder in subsequent instalments, the latter instalments being collected by the said Taylor. In the year 1873, George Fitz James Colburn, one of the trustees, and the only son of the testator, removed from Newark, and became a citizen of Washington, where he resided, except for a few months, up to the day of his death in September, 1897. John W. Taylor, the co-trustee, was a prominent lawyer of the city of Newark at the time of his appointment; was regarded by the general public as a man of business integrity, and continued so to be up to the very day of his death, in the year 1893. On the death of Taylor, by his own hand, it was found that he had squandered many estates under his custody, amongst others the estate of Augustus G. P. Colburn, except the sum of five thousand ($5,000) dollars, which was under the exclusive control of his co-trustee, George Fitz James Colburn, in the District of Columbia, which latter sum has been turned over to appellant, Franklin H. Mackey, by the executor of the trustee, Colburn, the defendant, Robert E. Grant. It further appears that the trust estate, except the said sum of $5,000, was by said George Fitz James Colburn left solely to the collection, and to the management of the said Taylor, his co-trustee, who handled the same without the co-operation, supervision or knowledge of Colburn, the latter only requiring from Taylor the payment of the income of said estate to him as provided by the will. It also appears that upon the death of Taylor, the surviving trustee, Colburn, made a claim against the estate of the deceased trustee for the amount of the trust fund squandered, as aforesaid, and upon said claim for $22,000, realized $3,342.45. That the children of Hervey Colburn by papers writing dated respectively September 6, 9 and 11, 1895, released the claim to said sum of $3,342.45 unto said George Fitz James

Colburn, and that thereupon the said George Fitz James Colburn applied the money so received by him to the purchase of an annuity for himself, for which purpose the release aforesaid was made.

The bill in this cause was filed on the 27th day of January, 1899, nearly six years after death of Taylor, and some months after the death of said George Fitz James Colburn, against his executor, the defendant, Robert E. Grant, praying for reference to the auditor of the court to take and report an account of the trust estate of Augustus G. P. Colburn—

> "as it came, or should have come, into the hands of said trustees, and of their acts and doings in respect thereof, and for how much thereof the said surviving trustee [George Fitz James Colburn] was properly accountable at the time of his death."

On hearing before the justice holding special term for equity business the bill was dismissed with costs, and on appeal the decree below was affirmed by the Court of Appeals for the District of Columbia.

I.

The circumstances of the present case, as contained in the bill, answers and stipulation as to facts, being considered, and the law as generally applicable to such cases being applied, no liability should attach to the estate of George Fitz James Colburn, nor should any relief be granted against his personal representative, the defendant, Robert E. Grant, and the judgment below was correct.

It should be remembered that Augustus G. P. Colburn named as trustees of his estate (Rec., p. 6) his son, George Fitz James Colburn, and John W. Taylor, the latter of whom he designated as "*my friend.*" The Record shows answer and stipulation as to facts), that Taylor, at the time of his appointment and up to the day of his death, had

been a man of the very highest reputation; that he was esteemed by all, and held the most responsible positions. In a word, he had been regarded as of undoubted integrity and great business capacity, holding in both official and private relations positions of honor and financial responsibility.

In considering the phases of the present case we must regard all the inducements that led the surviving trustee, Colburn, to pursue the course for which his estate is now charged.

Let us turn to the house in Newark on May 25, 1872. We may presume that Augustus G. P. Colburn was on his dying bed, for he departed this life on May 27, 1872. He was about to bid farewell to those whom he had loved. He had but one son and for him he wished to care. The dying testator ran over in his mind all of those whom he could best trust to care for that son's interest and his choice rested upon John W. Taylor, to whom, almost with his dying breath, he applied that most affectionate term "my friend." He thought his selection well fitted to manage the affairs of the estate. The naming of the son as co-trustee, was of but secondary consideration in the parent's mind. The "friend" was versed in such matters, and he (the testator) felt that in his hands the interest of the son was safe. And this was the state of affairs as they were presented to the son and co-trustee at the father's death. The property was sold, partly for cash and balance in installments, which latter were collected by Taylor (Stipulation, page 11). The opinion of the father was naturally entertained by the surviving trustee, the son; who, knowing the confidence felt by his parent, only followed the example set him, by reposing like confidence in Taylor. Surely, there was nothing to put him on inquiry, or to suggest that there was any danger to the fund. Five thousand dollars of the fund realized was committed to the care of George Fitz James Colburn; by him invested, and is now in the hands of the plaintiff, Mackey,

trustee. The balance was left in the hands of Taylor in Newark for investment and was, presumably, invested when received. And so the matter moved along. The life tenant received the income from the estate with regularity. Taylor continued to hold the confidence of the public, and, in the words of the stipulation—

> "Was a prominent lawyer of the city of Newark at the time of his appointment and continued so to be up to the date of his death in the year 1893, and he was regarded by the general public as a man of business integrity, at the time of his death, by his own hands, on the 20th November, 1893."

It was in such a man that the son, George Fitz James Colburn, continued to have full faith; the man of high reputation, his living and dying father's *friend*. As above stated, his interest was regularly transmitted to him, and this fact, coupled with the trustee's standing was, naturally, sufficient to justify his remaining passive in the premises. He had moved away from Newark in 1873, and had become a citizen of Washington. He was far away from the fund, and left the affairs at Newark to the control of the trustee on the spot. In so doing, did he not do precisely what nine out of every ten men would have done under similar circumstances? The fact of Taylor's defalcation came upon him as upon every one else, as a deadly flash of lightning from a cloudless sky—without the slightest premonition. It is submitted, with confidence, that George Fitz James Colburn's course is to be judged, *not* by the facts of the case *as they now appear to have existed, but as they appeared to him and to others to exist at the time.* As the justice dismissing the bill in the equity court aptly remarks—

> "after a loss has occurred, as in this case, by the positive fault of some one, it may be easy to say how it could have been prevented; but in order to hold some one else fairly responsible for it, the point of view held by the party sought to be made liable *at*

> *and before the loss occurred is the only safe point of view to assume"* (Rec., p. 16).

And the court then very justly adds:

> "From the light of the circumstances as thus shown, I can not convince myself that George Fitz James Colburn was guilty of any such negligence as to render him liable, nor that the claim now made by the bill in this case is a proper one to be allowed against his executor" (Rec., p. 16).

And the Court of Appeals in the opinion, affirming the lower court say (page 23):

> "But we fail to find in the agreed statement of facts sufficient proof of the abandonment of the duties of the trust by George Fitz-James Colburn or any proof of negligence on his part in the supervision of the trust in such manner as to render himself, or his estate, liable."

The holding of the Court of Appeals is undoubtedly in agreement with the generally accepted doctrine.

In Hill on Trustees, Bispham's Edition (4th), in note on page 470 the editor says:

> "The liability of co-trustees and executors for each others' acts does not appear to have been always as rigorously enforced in the United States as the later English authorities stated in the text would justify. Judge Story, in his Commentaries on Equity Jurisprudence, Sec. 280, uses the following language: 'The general rule is that they are responsible only for their own acts and not for the acts of each other, unless they have made some agreement by which they have expressly agreed to be bound for each other, or they have, by their voluntary co-operation or connivance, enabled one or more to accomplish some known object in violation of the trust.'"

The case of The State of Ohio *vs.* Guilford, 18 Ohio, 500, passes on this question, and is a well considered and very instructive case. Here was a defalcation of one of several trustees, the former having been permitted to exercise exclusive control over the trust estate. The subject of the trust was a charity fund for the benefit of the poor and distressed. The court in passing on the matter said (508):

> It will be the fixed purpose of this court to guard most vigilantly the charities created within its jurisdiction, and in no one would we regard remissness of duty in the administrators with keener jealousy, than in the management of a fund appropriated by benevolence, to the elevation in the scale of humanity of the poor and helpless."

Surely in such a case as the above, if ever, the doctrine invoked by the plaintiff should be enforced. And yet says the court (508):

> "We must in this class of cases, as well as in all others, apply to the individual transaction those general rules which are the offspring of wisdom and experience, and determine, upon the particular circumstances of the case, whether these rules attach a penalty or not."

And such we claim should be the rule applied in the present case. The court, continuing, after reviewing authorities on the subject, adds, approving *Ex parte* Belcher *vs.* Parsons, Ambler's Report, 219:

> "These rules should not be laid down with a strictness to strike terror into mankind, acting for the benefit of others . . . to add hazard and risk (to the trouble) and to subject a trustee to losses which he could not foresee, and consequently not prevent, would be deterring everyone from accepting so necessary an office" (510).

The court further dwells upon the fact that the defaulting trustee was the one who enjoyed the special confidence of

the testator, and then says: "Ought the defendants" (the other trustees) "to have required bond?" and as a reason for a negative answer adds: "He was their co-trustee, possessing character and responsibility," etc.

The court finally says:

> "It is most probable that if their own private property, to an equal extent, had been managed by Williams they would have taken no greater precautionary measures to insure its safety" (512).

And this seems to be the maximum care required—the same care that a man would exercise in his own case.

The court also quotes, with approval, from Howard *vs.* Webster, Select Cases in Equity, 53, as follows (513):

> "To require him (defendant) to have dealt with his colleague as a rogue, by calling upon him for the securities, would require of him the highest and most exact vigilance, a degree of it that would ruin every guardian. No rate of compensation would compensate the risk of such a trust, and no man would accept."

In conclusion the court declares:

> "We make application of all these wholesome rules of conduct to the circumstances spread before us, and upon the whole case, both in regard to law and the evidence, after a careful examination, we find ourselves forced to the conclusion, that upon none of the grounds which have been assumed by counsel for the plaintiffs, are the defendants to be charged with the loss sought to be fastened upon them. They have acted with entire good faith, and with reasonable diligence."

Surely if the court should have thus decided, in a case like the one referred to, there should be no responsibility placed upon the defendant in the present case, in view of all the surroundings, as he was guilty neither of fraud, culpable negligence, or collusion, but only followed the example

set him by his father, who had full faith and confidence in Taylor, which the son had every reason to have also, in view of Taylor's standing in the community, and generally recognized integrity.

In Boyd's Exrs. *vs.* Boyd, 3 Gratt. 113, the court follows the same reasoning as in the cases above, saying:

> "This court is further of opinion that in this transaction the executors acted as trustees, and as such can only be held for their respective receipts, unless some circumstances of fraud, or of gross neglect amounting to fraud, appeared in the case."

In Latrobe *vs.* Tiernan, 2 Md. Chan. 449, speaking of liability of trustees for acts of their co-trustees, the court says:

> "They are only responsible for their own acts, and not for the acts of each other, unless they have made some agreement by which they have engaged to be bound for each other, or they have by their own voluntary co-operation or connivance, enabled some one or more of them to violate the trust."

See, also, Stell's Appeal, 10 Barr. 150.

It has been suggested by the complainants that bond should have been required by the co-trustee. As above stated, he had no reason to suppose such a course necessary. Bnt why was it more incumbent on him to take such a step than on the complainants here? They were contingent remaindermen. Indeed, they were, in view of the age of the parties, life tenants, virtual vested remaindermen, as the probability of birth of children to the life tenants was very remote, and that was the only event under which the complainants' interest could be divested. If they deemed the course pursued by George Fitz James Colburn negligent, they had a full right to come into court and ask for a bond from both parties, and the court would have granted it, upon

a reasonable showing. They did not do so, because, like Colburn, they deemed Taylor a man of probity and in every way worthy of confidence. They were deceived just as he was, and are as much to blame, if any blame exists.

The language of the equity judge in this connection, is well considered and persuasive (Record, page 15).

> "I think it may well be presumed that the remaindermen knew just as much about the situation as the surviving trustee did during Taylor's life; that they knew the $5,000 was in this city, in Colburn's hands, and the $22,000 in Newark, in Taylor's hands, and that the income was regularly paid to the life tenant, and if they had any knowledge of anything that would in any way indicate that the estate in Taylor's hands was in peril, and had reason to believe Colburn was ignorant of it, and yet did nothing themselves to inform Colburn or call Taylor to account, that would have been bad faith on their part, sufficient to bar them from recovery in this suit. I do not believe, however, that they had any such knowledge of wrong doing, but I do believe they and Colburn alike had implicit faith and confidence in Taylor until after his suicide, and the subsequent proceedings indicate that they were in perfect harmony, and that the remaindermen made no claim that Colburn was to blame or that he was in any way responsible for the loss they had jointly sustained while the said Colburn lived, nor until the filing of this bill since his death."

In Banks *vs.* Wilkes, 3 Sanford, 108 (99), this subject was also before the court. In this case the entire trust fund had been kept and was under the exclusive control of one trustee. The claim was made that:

> "The act of placing these securities in his hands or suffering him to take possession of the same, was a breach of trust, which subjects them to all the consequences flowing from his control over the securities."

The court held that no responsibility existed, as:

> "The loss in question occurred before there was any known reason or cause for the defendants to interfere with the trustee's possession of the bonds and mortgages."

See, also, Hill on Trustees, 311, where the trust fund was administered by one of the trustees who lived in London, with the permission of the others who lived in Cornwell. The court holding that this was not unreasonable. See, also, cases referred to by same author in sections 311 and 312.

It must not be forgotten that the trustee (Colburn) moved from the city of Newark in 1873, and never lived there after. And, further, that the fund by him exclusively administered, to wit, five thousand dollars, was fully accounted for.

The Court of Appeals after going over the Record before them say (page 22):

> "The question in the case is, whether, under the circumstances stated, a trustee can be held liable for the malfeasance of his co-trustee. The principles of law applicable to the case are simple enough, and there is no real controversy between the parties in regard to them. The controversy is rather one of fact than of law, or rather it is whether an inference of negligence can be drawn from a certain conceded state of facts"—

and after carefully reviewing the facts dismiss the bill in the following language (page 23):

> "But we fail to find in the agreed statement of facts sufficient proof of the abandonment of the duties of the trust by George Fitz James Colburn, or any proof of negligence on his part in the supervision of the trust in such manner as to render himself or his estate liable. . . . It is very evident that the testator had confidence in Taylor, . . . and the joinder of Taylor in the trust is, under the

circumstances, strong evidence that it was the testator's intention that his should be the controlling mind in the management of the trust; and this view is fully corroborated by the fact that Colburn, in view of his own special interest in the trust, and that there was a residuary devise of the trust fund, might not be entirely impartial or entirely judicious in such management. If the real estate which originally constituted the trust fund had remained unsold, and no duty had been imposed on the trustee Taylor, other than to collect the rents and to remit them to Colburn in Washington, and this duty had been left exclusively to him, we do not think that it would be reasonable to infer, from this fact alone, that Colburn abandoned the trust, and yet in that contingency this would have been the only duty to be performed under the trust, except the payment of taxes and insurance, and all this would necessarily have been under the supervision of Colburn and subject to his approval and ratification in the acceptance of the rents remitted to him. When the real estate was sold and the proceeds invested or reinvested, did any different conditions arise? It does not anywhere in the record appear how this fund of twenty-two thousand dollars, alleged to have been left to the management of Taylor, was invested. It does not appear that, after having been once invested, there was even need or occasion for reinvestment. . . . That Taylor obtained control of the fund and misappropriated it is very clear; but when, or how, or under what circumstances he did so, we are not told. For all we know, he may have come into possession of the fund in the last week, or the last month of his life, and he may have been the ministerial agent to receive the money when it was due and payable. He may have come properly into possession of it, and the misapplication may have been an afterthought. We can not infer delinquency on the part of Colburn when there is no more proof than is contained in this record, that, by his abandonment of his trust, or by his negligence in the supervision of it, he had put it in the power of his co-trustee to prove faithless to his duty. Abandonment of discretionary power by a trustee to his

co-trustee is a fact to be proved by him who alleges it, and so likewise is negligence in the supervision of a trust. Neither abandonment nor negligence is to be implied without satisfactory proof of the fact or of circumstances sufficient to warrant the inference, and we do not find that proof in the statement of facts contained in this record."

The above extract appears to meet the full exigencies of the case before us, and is conclusive as to the correct holding of the lower court.

II.

But there is still another reason why the bill should have been dismissed. It will be remembered that when the trustee, Taylor, died, and it appeared that he was a defaulter, the co-trustee, Colburn, immediately presented his claim, as such, against the defaulting trustee's estate. As a result there was paid to the said Colburn about thirty-four hundred dollars. The parties in interest met together, and, by mutual agreement, Colburn was permitted to secure by means of this fund, an annuity, for himself, all the parties waiving any interest, in writing, in the fund. It is confidently claimed that this was a meeting of the parties in interest and a statement of accounts between them and a full acquittance of any further demand. It was undoubtedly so intended, and this claim now is an afterthought born of advice of counsel that there might be a possibility of success in event of suit. Can it be for a moment doubted that such was the intention of all parties? Surely not. This court has the right to regard it as so settled, and to consider the present parties complainant estopped from coming into court as they now do to invoke its aid, in a manifestly unjust demand. Particularly so when the co-trustee, upon whom the reflections are made, is now unable to speak.

Indeed, though Taylor died on November 20, 1893, and his co-trustee, Colburn, lived until September 21, 1897, four

years, there never was, so far as the Record shows, any evidence of an intention to hold the latter responsible for the defalcation of the former.

In whichever light the circumstance may be viewed; as an estoppel, or as a presumption of fact, with all its effective and persuasive result, it bears out the contention of the appellees, that a full settlement was intended and was had at that time.

To sum up, it is contended for the defense that:

First. Under the authorities, as applicable to the facts of the case, no liability exists.

Second. That there was an equitable settlement between the parties in interest, as shown by the written releases filed, and that the complainants are equitably estopped from making the claim now advanced.

Third. There being a failure of equitable right, the bill was properly dismissed, and the decree below should be affirmed.

J. HOLDSWORTH GORDON,
Solicitor for Appellees.